IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6408 of 1998
AND
SPECIAL CIVIL APPLICATION No 6409 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

UPENDRABHAI JASUBHAI JOSHI

Versus

DISTRICT MAGISTRATE

Appearance:
MR YS LAKHANI for Petitioner
GOVERNMENT PLEADER for Respondent No. 1, 4
RULE NOT RECD BACK for Respondent No. 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA
Date of decision: 06/11/98

COMMON ORAL JUDGEMENT

These two writ petitions under Article 226 of the Constitution of India can be disposed of by a common judgment because on identical allegations the detention order was passed in the two cases by the Detaining

Authority.

The detention order in both the cases was passed by the Detaining Authority on 22.7.1998. In brief the allegations were that the petitioners were indulging in adulteration of HSD by mixing kerosene in large quantity and selling adulterated diesel at higher price and deriving huge profits by indulging in such activities. Petrol Pump was raided and several irregularities were found. The density of the diesel was not upto the mark. There was also discrepancy in the actual stock. No doubt detailed reasons have been given in the grounds of detention but it appears that ultimately the Detaining Authority found that not only adulterated diesel was being sold but less quantity was being supplied to the consumers and illegal profit of 70 paise per litre was being earned. The allegation of conspiracy against the petitioner in such activity was also disclosed in the grounds of detention. It was also noticed that the activities of the petitioners were punishable under section 7 of the Essential Commodities Act. Accordingly, under section 3 sub-section (2) of the Prevention of Blackmarketing & Maintenance & Supply of Essential Commodities Act, 1980 the impugned order was passed.

The petitioners made representation to the Advisory Board, to the State Government as well as to the Central Government. Their representations were turned down. Consequently these writ petitions were filed.

Learned Counsel for the petitioners have challenged the detention order mainly on three grounds.

The first ground is that number of illegible documents were supplied to the petitioners by the Detaining Authority and these included copies of bills and copies of statements of witnesses. Since these documents are illegible the petitioners were prevented from making effective representation against their detention. Learned Public Prosecutor had to admit that some of the material documents supplied to the petitioners were illegible. Non supply of legible documents especially copies of bills and statement of witnesses to the petitioners in these set of facts certainly prevented them from making effective representation against the detention order and on this ground the detention order has to be quashed.

The second ground raised by the learned Counsel for the petitioners has been that one representation was sent by their wives on 22.8.1998 to the Central

Government addressed to the Secretary, Food and Civil Supplies Department, Union of India and the fate of that representation has not been communicated to the petitioners. This ground was not initially taken in the writ petition. It was introduced through an amendment in the writ petition and on plain reading of the additional ground it seems that it is a half hearted ground. The affidavits of Shri P.D.Shah, Under Secretary to the Government of Gujarat, Food, and Civil Supplies and Consumer Affairs Department as well as of Shri Kamal Kishore, Economic Adviser in the Department of Consumer Affairs, Ministry of Food and Consumer Affairs, New Delhi indicate that the representations of the petitioners were promptly dispatched and dealt with and rejected. The order of rejection was also promptly communicated to the petitioners. Shri Lakhani, learned Counsel for the petitioners could not convince me that certain new grounds were taken in the representation sent by the wives of the petitioners on 22.8.1998. If no new grounds were taken in these representations and earlier representations containing identical grounds were considered and rejected it cannot be said that the detention orders suffer from any illegality because of non consideration of subsequent representations sent by the wives of the petitioners. The additional affidavit filed today does not make any difference in this situation. Consequently on this ground the detention order cannot be quashed.

The last ground is that if the petitioners had indulged themselves in large scale black marketing of diesel oil they could be prevented from indulging in such activity by revoking or suspending their licence and this possibility was not considered by the Detaining Authority. The grounds of detention had been read before me. After going through the grounds of detention I could not find any mention in the same from which an inference can be drawn that the Detaining Authority was aware of the situation that in the facts and circumstances of the case suspension or cancellation of licence would not be the effective remedy in preventing the alleged nefarious activities of the petitioners. Learned Public Prosecutor has contended that it seems that by mistake it was not mentioned in the grounds of detention by the Detaining Authority that this possibility was considered. However, this contention cannot be accepted. It is not a case of mistake. Even vaguely it is not stated in the grounds of detention that suspension or cancellation of licence was not efficacious remedy in preventing the black marketing of the essential commodity.

Learned Public Prosecutor has relied upon a Division Bench pronouncement of this Court in Parshottambhai Navalram Khemani Vs. State of Gujarat and Another 26(2) GLR 620. Her main contention has been that it is not for this Court to sit in appeal over the discretion of the Detaining Authority in arriving at subjective satisfaction and this Court cannot say that on the material on record the Detaining Authority could not have arrived at such subjective satisfaction. In my opinion, this case does not support the learned Public Prosecutor, rather, it goes against her. It has been laid down in this case no doubt that alternative remedies are no bar to the preventive detention. Thus availability of alternative remedy according to this case is no bar for ordering preventive detention. In this very case, in para 15 it has been observed as under :

"15. It is in these circumstances that we have to address ourselves to the moot question as to whether the detaining authority had addressed itself to the material aspect as to whether cancellation of the petitioner's licence would be sufficient on the facts of the case to keep the petitioner out of harm's way and would be an effective alternative remedy rendering his preventive detention which is a more drastic action unnecessary. It is obvious that if this material consideration has not entered the process of subjective satisfaction of the detaining authority, the petitions must succeed."

From the above observations it is clear that if the Detaining Authority has not entered in this exercise in the process of arriving at subjective satisfaction the petitions must succeed. At another place in this very judgment at page 638 it was observed that on the facts of this case there is no escape from conclusion that this consideration has also in fact entered exercise of subjective satisfaction of the Detaining Authority. Once that conclusion is reached the limited scope of inquiry before this Court comes to an end. It is thus clear that in this case the Detaining Authority has considered whether cancellation of fair price shop's licence was effective remedy or not. This case is distinguishable because in this case the Detaining Authority had considered the question pertaining to cancellation of petitioner's licence. It was observed that on the facts of this case it must be held that all the relevant considerations pertaining to cancellation of petitioner's licence were kept in view by the Detaining Authority. All the pros and cons of situation had been kept in view

by the Detaining Authority and it is thereafter that the orders in question were passed. In the case before me the Detaining Authority viz. the District Magistrate Shri R.C.Gohil in his affidavit has not mentioned that he considered the efficacy of suspension or cancellation of petitioners licence, and that by mistake he could not mention this fact in the detention order or in the grounds of detention. Consequently the theory of mistake argued by the learned Public Prosecutor falls to the ground.

Mr.Lakhani has referred to an earlier Division Bench pronouncement on the same point in the case of Ganeshbhai Gangabhai Harijan Vs. District Magistrate, Banaskantha and others, 24(2) GLR 1016. This case was also considered and referred in the subsequent Division Bench pronouncement in P.N.Khemani's case (Supra) and the same ratio is to be found in this Division Bench's case also where also it was laid down that even if alternative remedy is possible detention order could be passed. However, the Court must satisfy that such possibility was present before the Detaining Authority. If there is no such satisfaction it amounts to non application of mind and consequently the order of detention becomes illegal. It was further emphasised that the Detaining Authority must indicate that such possibility was taken into consideration. The Division Bench proceeded to observe further that where alternative remedies or possibilities of preventing the petitioners were present, detention order could have been passed. Instead of launching a prosecution it might become necessary in certain cases to detain the detenu and that might be an efficacious way of prevening him from going with objectionable activities. However, the court must be satisfied that this possibility was very much present before the Detaining Authority and after taking into consideration and after knowing the pros and cons, the prognosis was arrived at. If this is not done, then clearly detention would be bad because it would be suffering from the vice of non-application of mind.

Thus from these two Division Bench pronouncements it is manifestly clear that if the Detaining Authority did not indicate in the ground of detention or in the order of detention that suspension or cancellation of licence could be no effective remedy and the preventive detention was the only effective remedy the order of detention would suffer from vice of non application of mind. If from the order of detention or grounds of detention it could be found that the Detaining Authority applied its mind to the possibility that cancellation or

suspension of licence will not be effective remedy then ofcourse this Court cannot scrutinise whether on material on record the subjective satisfaction recorded by the Detaining Authority is correct or not. Consequently, on this ground also the order of detention has to be set aside.

For the reasons given above the two petitions succeed and are hereby allowed. The impugned orders of detention dated 22.7.1998 passed against the petitioners are hereby quashed. The petitioners shall be released forthwith unless they are wanted in connection with any other crimnal case.

Sd/-
(D.C.Srivastava, J)

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m.m.bhatt